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No. 264

In the

Supreme Court of the United States

October Term, 1962

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE W. GOWINS,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

Question Presented 1
Statutes and Regulations Involved 2
Statement of the Case 3
Argument 6

Cases Cited

Affolder vs. New York, Chicago & St. Louis R. Co.
339 U.S. 96 13

Calabritto vs. New York, New Haven & Hartford R. Co., 287 Fed. 2d 394 ..... 8, 12

Carter vs. Atlanta & St. Andrews Bay R. Co.
338 U.S. 430 13

Coray vs. Southern Pacific Company
335 U.S. 526 13

Ford vs. New York, New Haven & Hartford R. Co.
54 Fed. 2d 342, cert. denied, 285 U.S. 549 12

Gibson vs. Elgin, Joliet & Eastern Railroad Company
246 Fed. 2d 834 12

Givens vs. Missouri-Kansas-Texas R. Co. of Texas
195 Fed. 2d 225 13

Harris vs. Pennsylvania Railroad Company
80 Sup. Ct. 22 12

Harsh vs. Terminal R. Co.
75 Sup. Ct. 362, reversing 114 N.E. 2d 901 13

Lavender vs. Kurn
327 U.S. 645 ..... 12, 13

Lilly vs. Grand Trunk Western R. Co.
317 U.S. 481 ..... 6, 7, 8, 10, 12

McCarthy vs. Pennsylvania Railroad Company
156 Fed. 2d 877 11
Minehart vs. Southern Pacific Company
288 F. 2d 999 ..... 8, 13
New York, New Haven & Hartford R. Co. vs. Leary
204 Fed. 2d 461 13
Rogers vs. Missouri Pacific Railroad Company
352 U.S. 500 ..... 6, 11, 12, 13
Schulz, Admrx. vs. Pennsylvania Railroad Company
350 U.S. 523 12
Urie vs. Thompson, Trustee
337 U.S. 163 11

Authorities Cited

Title 45, U.S.C., Section 23 ..... 6, 10
Title 45, U.S.C., Section 51 ..... 2, 11
Regulations of Interstate Commerce Commission:
Code of Federal Regulations
Title 49, Part 91
Section 91.209a 2, 10
Section 91.203(a) and (c) 3, 9
Section 91.229(a) and (d) 6, 8, 9

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QUESTION PRESENTED

The Question Presented, as stated in the Petition filed by petitioner herein, should be amplified as follows:

1. Where respondent, an employee of petitioner, testified that during a road run it was necessary in the course of his duties to use walkways on petitioner's locomotive in order to go to and from the cab thereof, that there was oil on the walkways and it was therefore necessary for him to walk through the oil "all the time," that after he debarked said locomotive to a ground surface of cinders and soil he lined up a switch and then went to a nearby

telephone and from there walked a distance of 200 to 250 feet to an automobile parked near the tracks, that he conversed with the driver of the automobile 5 or 10 minutes and that he then went to the tracks, and, while attempting to board a moving locomotive, slipped and tripped on a ground line air hose, did the Court of Appeals err in holding that respondent's claim for damages under the Boiler Inspection Act should have been submitted to the jury?

STATUTES AND REGULATIONS INVOLVED

In addition to the statute and the regulations cited in the Petition for Certiorari, the following section of the Federal Employers' Liability Act and the following rule of the Interstate Commerce Commission are involved in this case:

Title 45, U.S.C., Section 51:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Code of Federal Regulations, Title 49, Part 91, Section 200a:

> 91.200a. "*Responsibility for design, construction, inspection and repair.* The railroad company is held responsible for the general design, construction, inspection and repair of all locomotives used or permitted to be used on its line. It must know that all inspections, tests and repairs are made and reports made and filed as required, and that all parts and

appurtenances of every locomotive used are maintained in condition to meet the requirements of the law and the rules and instructions in this subpart.

Respondent denies that Section 91.203(a) (Code of Federal Regulations, Title 49, Part 91, Section 91.203(a)) is involved in this petition for writ of certiorari.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case set forth in the Petition for Certiorari insofar as the precise issue which petitioner has raised is concerned, with, however, the following amplification and addition. Respondent's duties required him to get onto and off from the locomotives and, therefore, to use the walkways (R. 36a-37a). Respondent further testified (R. 37a):

Q. And in the course of that trip is it fair to state that you used the walkways of both locomotives? A. All the time.

Q. State to the Court and jury what the condition was of the walkways on those two locomotives. A. Oil on all the locomotives on the walkways, practically all of them but the 8947 was worse than the rest of them.

Q. And in the course of your duty was it necessary for you to walk through the oil? A. All the time.

The foregoing, together with the evidence stated in petitioner's Statement of the Case, comprises the revelant evidence relating to the issue of the Boiler Inspection Act which was admitted at the trial. It was upon that admitted evidence that the decision of the United States Court of Appeals for the Sixth Circuit was based.

The Court of Appeals, therefore, did not rule upon the respondent's alternative question presented in that court.

which alternative question was based upon the claim that certain excluded testimony should have been admitted at the trial as evidence. The excluded testimony bearing on the issue of the Boiler Inspection Act was that of respondent on re-direct examination, which re-direct examination was in response to cross-examination on the violation of rule 1407 of the petitioner. The testimony was ordered stricken by the District Court in the following proceedings (R. 80a):

Q. All right. Now, he also quizzed you on Rule 1407. 'When getting on or off moving equipment, avoid if possible, coal, boards, stones, rubbish, refuse material, ties, rails, balast, holes, openings, bridges, culverts, tressels, etc., likely to result in falling, slipping, tripping, or turning ankle.' Now, Mr. Gowins, why did you not avoid coming into contact with that air line hose? A. Due to the oil on my shoes I slipped and tripped over the ground line hose.

Q. How do you know you had oil on your shoes? A. I had been walking in the oil, always on the walkway of the engines and so much oil in one engine we carried it in the cab.

Q. What engine was that? A. 8947.

* * * * * * * * * *

Mr. Barton: We also move that the statement relative to oil on his shoes also be stricken from the record and the jury to disregard it because that is re-direct examination and there is not one bit of evidence either in direct examination or our cross-examination relative to oil on his shoes.

The Court: Objection sustained. The jury is instructed to disregard it.

Mr. Grieser: Now, wait a minute. May I approach the Bench on this?

The Court: You may.

(Discussion had off the record at the Bench)

Mr. Grieser: Note my exceptions.

Respondent agrees with the decision of the United States Court of Appeals for the Sixth Circuit that the foregoing excluded testimony was not necessary in order to raise an issue under the Boiler Inspection Act for the jury's consideration. Respondent, however, includes the foregoing excluded testimony in his statement of the case for the purpose of preserving his right to refer to the same should it become necessary in any subsequent proceedings in this case.

ARGUMENT

In holding that respondent's claim for damages under the Boiler Inspection Act should have been submitted to the jury, the United States Court of Appeals for the Sixth Circuit was applying the controlling law as announced by this Court. The evidence admitted at the trial presented issues for the jury's determination of (1) the violation of the Boiler Inspection Act and (2) whether such violation caused in whole or in part, that is, "played any part, even the slightest, in producing," respondent's injuries. *Lilly vs. Grand Trunk Western Railroad Company*, 317 U.S. 481, and *Rogers vs. Missouri Pacific Railway Company*, 352 U.S. 500.

The respondent adopts the sound opinion of the United States Court of Appeals for the Sixth Circuit on the foregoing points, which opinion is a conclusive answer to the contentions made by petitioner in the Petition for Certiorari. The respondent will elaborate only to expose further the fallacies and inaccuracies contained in the Petition.

First, under the holding of this Court in *Lilly vs. Grand Trunk Western Railroad Company*, 317 U. S. 481, supra, it was encumbent upon the trial court to submit the issue of the violation of the Boiler Inspection Act to the jury. This requirement stemmed both from the command of the general language contained in the pertinent section (Title 45, U.S.C., Section 23) and from the regulation promulgated by the Interstate Commerce Commission which under said statute acquired the force of law. (C.F.R., Title 49, Part 91, Section 91.229(a) and (d)) This Court in the *Lilly* case expressly rejected the contention which petitioner is now trying to resurrect, namely, that the Act covers only defects in construction

or mechanical operation and does not protect against the presence of dangerous foreign matters or objects. In 1943, almost twenty years ago, this Court put that contention to rest in the case of *Lilly vs. Grand Trunk Western Railroad Company*, 317 U.S. 481; at page 487:

> "From various cases denying recovery under the Act, respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter. But there is no warrant in the language of the Act for construing it so narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment 'in proper condition and safe to operate . . . without unnecessary peril to life or limb.' Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb. Whatever else may be said about the cases relied upon by respondent, they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation."

The foregoing statement and holding by this Court is extremely significant, for the jury in the *Lilly* case expressly and specially found that these was *no* mechanical or physical defect (a leak in the tank) as claimed and alleged by the employee. The presence of the dangerous foreign substance (water and ice) was sufficient, *per se*, to support a finding that the Act was violated.

While it is true that the *Lilly* case did involve a rule of the Interstate Commerce Commission, the foregoing language strongly (if not conclusively) shows that the same result would follow under the provisions of the Act.

Even absent such a rule as that involved in the instant case, therefore, a jury issue was presented on the viola-

tion of the Boiler Inspection Act. *Calabritto vs. New York, New Haven & Hartford R. Co.*, 287 Fed. 2d 394; *Minehart vs. Southern Pacific Company*, 288 P. 2d 999.

The Interstate Commerce Commission, however, pursuant to the authority contained in the foregoing Act did promulgate a regulation which applies squarely to the facts in the instant case. Code of Federal Regulations, Title 49, Chapter 1, Subpart C—other than steam locomotives and appurtenances, Section 91.229:

> "*Cabs and Aprons.* (a) Definition. The word 'cab' as used in this subpart means that portion of the superstructure utilized for housing the enginemen and parts or appurtenances of the locomotive and through which a passageway is provided for the use of the enginemen."
>
> * * * * * * * * *
>
> "(d) *Floors.* Deck plates and floors of cabs, passageways and compartments shall be kept free from oil, waste, or any obstruction that will create unnecessary peril. Deck plates and metal floors shall be properly roughened, or other provisions made, to afford secure footing."

The walkways involved in this case were "passageways" within the foregoing rule, for they provided the only means of going into and out from the cab. The rule specifically requires that such "passageways * * * shall be kept free from oil, * * *." The pertinent portion of the regulation involved in the *Lilly* case provided that the "top of tender behind fuel space shall be kept clean, * * *." This Court in interpreting the foregoing language of the rule involved in the case of *Lilly vs. Grand Trunk Western Railroad Company*, 317 U.S. 481, stated at pages 486, 487:

> "From the phrasing of Rule 153 we think it aimed at requiring the top of the tender to be kept free of foreign matter which would render footing insecure.

> for example, coal, dust, debris, grease, waste water, and ice. While the locomotive inspection rules are generally devoted to details of construction and specification of materials, at least one other rule deals with the condition of surfaces upon which employees must stand. In using the word 'clean' the Commission must have meant something more than mere manner of construction or mechanical operation, because 'clean' does not naturally lend itself to such a limited connotation. That something more is the *continuing duty* of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous." (Emphasis supplied)

A fortiori, the pertinent language of the Rule involved in the instant case, that the passageways "shall be kept free from oil," could only mean that the Commission was imposing a *continuing duty* on the railroad to keep the passageways free from oil.

Petitioner's contention that such a requirement relates only to the time of daily inspection, and not to any subsequent violations, is completely out of harmony with the plain language of the rules and with the decisions of this Court holding that the railroad has a continuing duty to conform to the requirements of the Boiler Inspection Act. Section 91.203 (a), a portion of which is set forth in petitioner's petition at page 3, does not limit the effect of Section 91.229 (d) as contended by petitioner. Section 91.203(a) relates only to inspections and reports thereof that are required to be made. It has no direct reference to and does not limit the foregoing Section 91.229(d). In fact, Section 91.203(c) specifically states that the rule prescribes only the minimum number of inspections required and is not intended to prevent the railroad from making additional inspections.

Section 91.200(a) on the contrary does by its terms relate to the entire subpart containing the rules in question, including Section 91.229(a) and (d). The former section places upon the railroad an absolute duty that it "must know" that inspections, tests, repairs and reports are made and filed, "*and* that all parts and appurtenances of every locomotive used *must* be maintained in condition *to meet requirements of the law and the rules . . . in this subpart.*" (Emphasis supplied) The foregoing rule, therefore, by its express terms places a duty upon the railroad not only to make and file all inspections, tests, repairs and reports, but in addition a duty to maintain all parts and appurtenances in condition to meet the requirements of the rules in the subpart, one of which requirements is the clear, unqualified command that 'passageways shall be kept free from oil." Section 91.200a, therefore, expressly rejects the limited effect that petitioner contends for in its Petition.

Of course, the foregoing rule is only a codification of common sense and in harmony with the Act and the holding in *Lilly vs. Grand Trunk Western Railroad Company*, 317 U.S. 481, supra. It would indeed be idle to require the railroad to meet the requirements of the Act and the rules promulgated thereunder *only* at the time of daily inspection prior to the use of the locomotive. The Act (Title 45, U.S.C., Section 23) specifically refers to a locomotive "in use" on the line. The humanitarian purpose of the Act, moreover, would be thwarted, for the employee would be deprived of the protection at the very time when he needs it, namely, during the use of the locomotive.

The issue of the violation of that Act, therefore, should have been submitted to the jury under the holding of this court and the pertinent rules of the Interstate Com

mission. The Act and the rules clearly protect against the presence of dangerous foreign matters, in this instance by express reference to oil, and place upon petitioner a continuing duty to comply with the requirements of the Act and the rules while the locomotive is in use on respondent's line.

Petitioner's second major premise is that if there was evidence of a violation of the Boiler Inspection Act, such violation was as a matter of law not a proximate cause of respondent's alleged injuries. This contention is likewise contrary to the decisions of this Court. The Boiler Inspection Act (Title 45, U.S.C., Sections 22, et seq) and the Federal Employers' Liability Act (Title 45, U.S.C., Sections 51, et seq) are in *pari materia*; or stated in another way, the Boiler Inspection Act is substantially, if not in form, an amendment to the Federal Employers' Liability Act: *Urie vs. Thompson, Trustee*, 337 U.S. 163, 188-189; *McCarthy vs. Pennsylvania Railroad Company*, 156 Fed. 2d 877. Accordingly, if the violation of the absolute duty under the Boiler Inspection Act (dispensing with the requirement of negligence) caused "in whole or in part" (the test for causation under the Federal Employers' Liability Act, Title 45, U.S.C., Section 51) the injuries to respondent, the petitioner is liable. In the leading case of *Rogers vs. Missouri-Pacific Railroad Company*, 352 U.S. 500, the statutory test for a jury question on causation was held to be whether the negligence "played any part, even the slightest, in producing" the injuries. So here, if the evidence is such that a jury may conclude with reason that oil on the walkways played any part, even the slightest, in producing the injuries to respondent, then that issue should have been submitted to the jury. Certainly the jury could have found with reason that respondent

acquired oil on his shoes while walking on walkways covered with oil "all the time" and that some of the oil remained on his shoes up until the time that he slipped and tripped and, therefore, caused at least in the slightest part his resulting injuries. That such a finding would involve some speculation and conjecture or that other findings and other causes of the injuries could reasonably be made will not and did not justify the District Court from taking the issue from the jury. *Rogers vs. Missouri-Pacific Railroad Company*, 352 U. S. 500, 506-507, supra; *Lavender vs. Kurn*, 327 U.S. 645, 653; *Harris vs. Pennsylvania Railroad Company*, 80 Sup Ct. 22; *Schulz, Admrx. vs. Pennsylvania Railroad Company*, 350 U.S. 523; and *Gibson vs. Elgin, Joliet & Eastern Railroad Company*, 246 Fed. 2d 834.

The decision of the Sixth Circuit Court of Appeals on the issue of the Boiler Inspection Act was, in summary, in complete accord with the decisions of this Court and the applicable statutes and rues of the Interstate Commerce Commission. It may or may not be that the Circuit Court's decision herein was in conflict with that of the Second Circuit rendered in 1931 in the case of *Ford vs. New York, N. H. & H. R. Co.*, 54 Fed. 2d 342, cert. denied, 285 U.S. 549, (no rule of the Interstate Commerce Commission was involved therein); if so, the *Ford* case has been overruled by this Court in the case of *Lilly vs. Grand Trunk R. Co.*, 317 U.S. 481, supra, which squarely held that the Act *was* applicable to a foreign substance although no defect of construction or mechanics was present. The controlling and indisputable point is that the decision of the Sixth Circuit was in accord with the *Lilly* case and subsequent decisions under the Act, including the previously cited cases of *Calabritto vs. New York, N. H. & H. R. Co.*, 287 Fed. 2d 394, supra (decided by the same Second

Circuit Court of Appeals), and *Minehart vs. Southern Pacific Co.*, 288 P. 2d 999.

Similarly, on the issue of causation, the decision of the Sixth Circuit is in complete harmony with the myriad of cases decided by this Court and Circuit Courts, including the leading case articulating the controlling test for causation, *Rogers vs. Missouri Pacific Railroad Company*, 352 U.S. 500, supra, the leading case permitting broad scope to the jury in speculation and conjecture, *Lavender vs. Kurn*, 327 U.S. 645, supra, and the many analogous decisions applying the same principles to violations of the Safety Appliances Act and the Boiler Inspection Act, *Harsh vs. Terminal R. Co.*, 75 Sup. Ct. 362, reversing 114 N.E. 2d 901; *Coray vs. Southern Pacific Co.*, 335 U.S. 520; *Carter vs. Atlanta & St. Andrews Bay R. Co.*, 338 U.S. 430; *Affolder vs. N. Y., Chicago & St. L. R. Co.*, 339 U.S. 96; *New York, New Haven & Hartford R. Co. vs. Leary*, 204 Fed. 2d 461; *Givens vs. Missouri-Kansas-Texas R. Co. of Texas*, 195 Fed. 2d 225.

In short, we submit to this Court that there is no reason to review the decision of the Sixth Circuit on the Boiler Inspection Act by writ of certiorari whether viewed from the considerations set forth in Rule 19 of this Court or otherwise.

Respectfully submitted,

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